

Committee Secretary
House of Representatives Standing Committee on the Environment
PO Box 6021
Parliament House
Canberra ACT 2600

21 May 2015

Dear House of Representatives Standing Committee on the Environment

Re: Parliamentary Inquiry into the Register of Environmental Organisations

Not-for-profit Law (**NFP Law**) (previously PilchConnect) is a program of Justice Connect, providing free and low cost legal help to small to medium not-for-profit (**NFP**) community organisations, primarily across Victoria and New South Wales.

NFP Law 'helps the helpers' by providing tailored legal advice, information and training to NFP community organisations. By relieving the burden of legal issues, organisations can better focus their time and energy on achieving their mission. We are committed to improving access to legal help for NFP community organisations, and on improving the legal landscape in which they operate. Our policy and law reform work is focused on effective and appropriate regulation of the NFP sector, helping NFPs be more efficient and better run, and ensuring that reform takes into account impacts on the NFP sector.

Approximately a quarter of NFP Law's client enquiries each year involve questions about the complex and technical area of Deductible Gift Recipient (**DGR**) status, including endorsement via the Register of Environmental Organisations (**REO**). NFP Law, with the pro bono support of our member law firms, provides detailed legal advice to over 50 organisations with DGR-related issues every year. We provide legal training and information on DGR issues to many more. Since we launched our information hub (www.nfplaw.org.au) in July 2014 we have had over 2,380 unique hits to our Guide to DGR endorsement.

This submission is based on our experience working with small to medium NFPs, and includes examples of common legal questions we receive about accessing the REO. We have structured our responses around two of the Inquiry's terms of reference: the definition of environment organisation under the *Income Tax Assessment Act 1997* (Cth) (**ITAA**), and the administration of the Register.

In summary, NFP Law recommends that the Federal Government:

1. Adopt the definition of 'advancing the natural environment' set out in the *Charities Act 2013* (Cth) (**Charities Act**) to define eligibility for DGR endorsement of environmental organisations under the ITAA, and
2. Remove the REO, and instead use the Australian Charities and Not-for-profits Commission (**ACNC**)'s determination of a charity 'advancing the natural environment' for the purposes of DGR endorsement.

While NFP Law welcomes this opportunity to comment on the operation of the REO, we note the Federal Government is simultaneously conducting a broader consultation on the effectiveness of taxation concessions for the NFP sector, including DGR endorsement, through the *Re:think - Tax Discussion Paper* (**Tax White Paper**). We intend to respond to the Tax White Paper also. Given the clear nexus between the two processes, we propose that any recommendations made by this Inquiry should be considered in conjunction with the broader questions of DGR endorsement eligibility and regulation of the NFP and charitable sector being canvassed through the Tax White Paper.

1. The definition of environmental organisation under the ITAA

Recommendation 1: Adopt the definition of 'advancing the natural environment' set out in the Charities Act to define eligibility for DGR endorsement under the ITAA

This Inquiry presents an opportunity to simplify the regulatory framework for charities and not-for-profits by aligning the definition of environmental organisation for Federal charity and tax law purposes. The complexity of the current system is a cause of much confusion among the organisations we assist at NFP Law (see examples of common questions in box at right), and is a particular barrier for small volunteer-run organisations that rely on DGR status to attract vital philanthropic and public funds to support their ongoing viability.

The definition in the ITAA section 30-265(1) relates to eligibility for DGR status for environmental organisations. It states:

*'An environmental organisation's principal purpose must be:
"(a) the protection and enhancement of the natural environment or of a significant aspect of the natural environment; or
(b) the provision of information or education, or the carrying on of research, about the natural environment or a significant aspect of the natural environment....'*

The *Charities Act 2013* (Cth) introduced a statutory definition of charitable purpose including *'the purpose of advancing the natural environment'*.¹ The Charities Act definition is broad and encompasses the definition set out in the ITAA.²

Adopting the Charities Act definition for the purposes of DGR endorsement under the ITAA would streamline these two similar tests and processes. It would have the benefit that all environmental organisations eligible for DGR status would be subject to the ACNC's regulatory obligations (including public reporting on board members, activities and use of funds). It would also ensure that there are appropriate and independently-determined 'limits' on the type of advocacy that can be undertaken by environmental charities while accessing charitable/DGR tax concessions,³ as the ACNC is required to disqualify organisations that promote or oppose a political party or a candidate for office in a way that does not further their charitable purpose; or engage in, or promote, activities that are unlawful or contrary to public purpose.⁴

Specifically on the issue of advocacy, in *Aid/Watch*⁵ the High Court of Australia accepted that 'advocacy' in furtherance of a charitable purpose is a valid and important function of modern charities. Advocacy is intrinsically connected to 'on the ground' activities and service provision and in some cases advocacy may be the most efficient and effective way of achieving those charitable purposes. These principles have now been enshrined in the Charities Act which provides that 'promoting or opposing a change to any matter established by law, policy or practice' is a charitable purpose if it is in furtherance or aid of another charitable purpose.⁶ The ACNC has experience in applying these principles and has demonstrated a sound understanding of the permissible use of advocacy for charitable purposes.

We note that some international jurisdictions, namely Canada and New Zealand, have placed limits on the amount of 'advocacy' work (very broadly defined) that a charity can undertake and still be eligible for tax concessions, including

COMMON QUESTIONS TO NFP LAW: INCONSISTENCY IN DEFINITIONS

- We are a charity registered with the ACNC under the 'advancing the natural environment' category. Does this mean we are eligible for DGR status as an environmental organisation?
- If we register our charity with the ACNC, will this help us get onto the REO (because it will show we are a 'legitimate' environmental organisation)?
- In support of our principal purpose, can we use money that is donated to a REO public fund towards:
 - rescuing animals?
 - providing small grants for local environment groups?
 - travel to do our work?
 - international work?
 - explaining different policy options?

¹ *Charities Act 2013* (Cth) section 12(1)(j).

² *ibid cf Income Tax Assessment Act 1997* (Cth) section 30-265(1). Note that the Explanatory Memorandum to the *Charities Act 2013* (Cth) sets out that: *'Advancing the natural environment, without limitation, includes: preserving native flora and fauna; rescuing and caring for native animals; preserving or rehabilitating habitats; promoting sustainable development and biodiversity; and protecting, preserving, caring for, and educating the community about, the environment.'*

³ We also note there are a range of other laws which monitor the collection and use of money by charities and not-for-profits to ensure that funds are directed towards an organisation's purpose and used appropriately, including Australian consumer law (eg misleading and deceptive conduct), privacy laws and criminal law.

⁴ *Charities Act 2013* (Cth) section 11.

⁵ *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539.

⁶ *Charities Act 2013* (Cth) section 12(l).

DGR endorsement. We do not believe this to be best practice. In our view, any such restrictions, however they were introduced, would not be in the public interest, and would create uncertainty and inefficiency. It is our view that the amount of advocacy optimal to achieve a particular charitable purpose is not something that should be dictated by Government. In addition it would be time-consuming and costly to regulate this kind of restriction on charitable activities. It is more effective to allow donors, including philanthropic trusts which are often required to donate to DGR endorsed organisations,⁷ to decide towards what legal charitable activities they are willing to donate their money.⁸

In our view, advocacy undertaken towards a charitable purpose is a social good that is fundamental to the robust functioning of civil society and of our constitutional system of government.⁹ The Government should continue to provide (and consider broadening) DGR endorsements which support organisations to perform advocacy work for the vulnerable and under-represented.¹⁰

2. The administration of the Register and potential efficiency improvements

Recommendation 2: Remove the REO, and instead use the ACNC's determination of a charity 'advancing the natural environment' for the purposes of DGR endorsement.

While the vast majority of NFPs and charities are small, volunteer-reliant organisations with limited access to lawyers and other professional advisors, the current DGR system is extremely complex and convoluted, with various regulators each imposing their own conditions and requirements. The 'regulatory maze' is especially difficult for environmental groups seeking DGR endorsement (see box at right). For example, a small environmental charity seeking to access DGR status would need to:

- Appreciate the differences between their charity status (which gives access to certain tax concessions) and DGR endorsement which is a separate process with separate requirements
- Understand (and be able to meet) the REO requirements, including having a public fund and membership restrictions
- Change the organisation's rules to establish a public fund (if they adopted model rules under the incorporating legislation) by special resolution at a general meeting, and put in place the required accounting and governance processes for the fund (and also ensure these changes do not adversely affect charity status or any other tax concessions)
- Apply to the Department of the Environment for listing on the REO, and if successful, also meet the special conditions required by the ATO in order to be achieve DGR endorsement
- Report similar (or the same) information to multiple regulators

In our view, this current situation would be significantly improved if the ACNC's determination of charitable status were also applied to determine eligibility for DGR endorsement.

In practice this would mean:

- All environmental organisations would be required to meet the definition of a charity advancing the natural environment (per the Charities Act) for the purposes of DGR endorsement via the ATO

COMMON QUESTIONS TO NFP LAW: COMPLEXITY OF THE REO & TAX CONCESSION SYSTEM

- We don't have the required 50 members to be eligible for REO, but we understand it is possible to get an exemption – how does this work?
- Do we need to update our rules before we apply to REO?
- Which model clauses for public fund need to go in the 'public fund' section of our rules specifically, and which bits can go in other sections of our rules?
- Can we add to or alter the model clauses in any way?
- Do we need to be a registered charity with the ACNC to be a REO? If so, do we do this before or after applying for REO?
- We are a Victorian incorporated association and registered charity, and would like to apply for DGR status. Will we have to report to ACNC, REO, ATO or Consumer Affairs Victoria – or all four?
- How long it will take to get on the REO?

⁷ *Income Tax Assessment Act 1997* (Cth) section 30-15 (2) Item 2.

⁸ For further detail about the views of philanthropic organisations we refer the committee to the Australian Grant Makers Network's submission.

⁹ See discussion in Joyce Chia, Matthew Harding, and Ann O'Connell, 'Navigating the Politics of Charity' (2011), *University of Melbourne Law Review*, volume 35.

¹⁰ For further detail about how this recommendation is consistent with our international obligations we refer the Committee to the Human Rights Law Centre's submission.

- One registration process (to the ACNC) would enliven access to both charity status and DGR endorsement – as is currently the case with Public Benevolent Institutions and Health Promotion Charities
- Burdensome (and in our view unnecessary) administrative requirements currently imposed on REO organisations, including the requirement to have a public fund,¹¹ would no longer be necessary as these organisations would instead be subject to regulation by the specialist charity regulator, the ACNC – including in relation to governance, ongoing pursuance of charitable purposes, and use of donated funds (information about which would also be publicly available via the ACNC Register).

This recommendation is in line with the recommendations of the NFP Tax Concession Working Group's 2013 Final Report, which provides a helpful analysis of potential NFP tax concession reform generally.¹² Notably, the NFP Tax Concession Working Group Report sets out series of values by which to judge the current taxation system and alternative options: fairness, simplicity, effectiveness to maximise the social good, recognising 'giving' in Australia, efficiency, structural coherence and transparency.

Adopting our recommendation would have the effect of:

- standardising the definition of environmental organisation across charity and DGR laws (particularly if the specific listing is also removed)
- working towards standardising what is required in governing documents, policies and membership requirements for charities to access DGR endorsement
- working towards standardising reporting requirements for DGR endorsement
- working towards standardising disqualifying purposes for DGR endorsement
- ensuring fairness and transparency, as the ACNC already has robust processes for charity registration and reporting, and powers of investigation and revocation/enforcement if necessary. Similarly the ATO is well equipped to administer tax laws and take action in the event of non-compliance by a DGR endorsed organisation
- ensuring structural consistency by maintaining the ATO's role in applying tax concessions, and
- ensuring fairness as the ACNC and the ATO both have strong administrative review processes around their decisions.

This approach would also simplify the current regulatory framework, which is currently inaccessible to many. Several recent reports by the National Pro Bono Legal Resource Centre consistently show that around 60% of pro bono legal work at law firms is being done for not-for-profit organisations, and DGR endorsement is in the top five areas of that pro bono work.¹³ This is so, even though these reports also highlight that requests for assistance with DGR applications is one of the most frequently rejected areas for pro bono assistance and that *'law reform is required to make the DGR application process much simpler so that limited pro bono resources can be deployed in other areas of unmet need'*.¹⁴

As well as the complexity of the current regime, there is also a concern about the perceived unfairness of Ministerial decisions leading to DGR endorsement. While decisions about whether organisations fall into certain DGR categories are currently made independently by the ACNC (in the case of public benevolent institutions and health promotion charities), in other cases (including for REO) there are Ministers involved in decision making.¹⁵ Ministerial involvement lends itself to concerns about lack of transparency and consistency of decisions.

Whilst anecdotally our clients' experiences with the Department of the Environment's REO Unit have been generally positive (in terms of providing advice on eligibility and assistance to apply), moving the function to the ACNC would provide a fairer, more transparent and standardised approach. The ACNC is already delivering high quality education and support to the charity sector and is well placed to take on functions currently undertaken by the REO Unit.

We also note there have been long held concerns about the inherent conflict between the ATO's role to expand the tax base and it undertaking the eligibility assessments for NFP tax concessions. This concern was partially addressed by

¹¹ To understand the complexities involved in operating a public fund see *Income tax: public funds* [1995] ATOTR TR 95/27

¹² Not-for-profit Sector Tax Concession Working Group, Commonwealth Treasury, Final Report (2013).

¹³ National Pro Bono Resource Centre, 'Fourth National Law Firm Pro Bono Survey: Final Report' (2014) page 33.

¹⁴ John Corker, National Pro Bono Resource Centre News 8 December 2010 <www.nationalprobono.org.au/news_detail.asp?id=77>

¹⁵ Note that currently in the ITAA there are four DGR endorsement categories that have Federal Government Departmental Registers - Register of Harm Prevention Charities, Register of Cultural Organisations, Register of Environment Organisations, and arguably Developing Country Relief Funds (Overseas Aid).

the establishment of an independent regulator to make decisions about whether an organisation meets the definition of a charity. In relation to REO, aligning the criteria for DGR endorsement with registration with the ACNC as a charity advancing the environment would further address these concerns. As mentioned above, both public benevolent institutions and health promotion charities are currently registered by the ACNC and then endorsed by the ATO for DGR and tax concession charity purposes.¹⁶ In these instances the ATO accepts the decision of the ACNC as to whether an organisation meets the relevant criteria to become a registered public benevolent institution or health promotion charity.

We suggest that further consideration could be given to the ATO's role in finally deciding on eligibility for tax concessions. We note the Productivity Commission's (2010) recommendation that '*at a minimum, endorsement of Commonwealth tax concessions for NFPs that are currently undertaken by the ATO should be undertaken by the [new national regulator]*'.¹⁷ We have previously submitted that in our view the ATO's function should be limited to applying tax concessions to those organisations that are independently assessed as falling within the relevant tax concession category and taking action where there is a suspected contravention of taxation laws.¹⁸

Removing the REO, and getting the ACNC to take over this regulatory function for environmental organisations, offers the benefit of improved efficiencies for Government and at the same time reduces costs to not-for-profit organisations, and their volunteers and pro bono advisors. Implicit in this recommendation is the continued existence of the ACNC. Given the potential efficiencies to be gained by dovetailing DGR assessment processes into the ACNC's determination of charity status, along the ACNC's strong results¹⁹ and strong community support,²⁰ we hope the Government will continue its commitment to an independent regulator.

Concluding comments

As we set out in our introduction, NFP Law recommends that the Government standardise the definition of environment organisation for charity and DGR purposes, and streamline the DGR eligibility assessment process by removing the REO and incorporating this registration function into the existing regulatory framework administered by the ACNC.

In order to implement NFP Law's recommendations, consideration would need to be given to ensuring that the ITAA maintained that DGR endorsed environmental organisations could operate internationally, the role of the ATO, and also removing specific listing.²¹ However we believe our recommendations provide for an effective solution to simplify and standardise the regulatory framework for both environmental organisations and for government.

Our work with small to medium not-for-profit highlights the urgent need for a more effective approach to all charitable and not-for-profit tax concessions, including DGR endorsement. Discussions on the need for reform to tax concessions are (and have been for some time) taking place within a broader framework of charitable and not-for-profit regulatory reform.²² We urge the Federal Government not to adopt a piecemeal approach to the taxation of charities and not-for-profits which serves only to increase uncertainty, and adds to the burden of highly regulated groups already grappling to understand their taxation situation. To this end, we submit that the Government should consider changes to the REO only as part of broader reforms to simplify the tax concession framework for charities and not-for-profit organisations.²³

Further discussion of our views on taxation reform for the charity and not-for-profit sector will be provided in our forthcoming submission to the Tax White paper.

Thank you for the opportunity to provide a response to this Inquiry and please do not hesitate to contact us to discuss our views further.

¹⁶ *Income Tax Assessment Act 1997* (Cth) sections 30.45 (1) (4.1.1) and 30.20 (1) (1.1.6).

¹⁷ Productivity Commission, Research Report, *Contribution of the Not-for-Profit Sector* (2010) page 145.

¹⁸ Submission to Treasury on the restating and standardising the special conditions for tax concession entities (including the 'in Australia' conditions) (May 2012): [Restating the 'In Australia' requirements.pdf](#)

¹⁹ Australian Charities and Not-for-profits Commission, 'Charity compliance report – December 2012- December 2014 and beyond' (6 May 2015).

²⁰ National Centre for Excellence, Final Report at <www.civilsocietycentre.org.au/about-the-project/final-report/>.

²¹ *Income Tax Assessment Act 1997* (Cth) section 30.55(2).

²² See Appendix One for NFP Law's recent law reform submissions on charity and tax law.

²³ For some options see the Not-for-profit Sector Tax Concession Working Group, Commonwealth Treasury, Final Report (2013).

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Juanita Pope', with a long horizontal flourish extending to the right.A handwritten signature in black ink, appearing to read 'Tarni Perkal', with a long horizontal flourish extending to the right.

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Appendix One: NFP Law submissions on tax and charity law since 2011

- Submission to Senate on Government proposal to repeal the ACNC: [Submission on proposal to repeal the ACNC.pdf](#)
- Submission to DSS Options Paper on regulation of charities: [Options for replacement arrangements following the abolition of the Australian Charities and Not-for-profits Commission.pdf](#)
- Letter to the Treasury on the Tax and Superannuation Laws Amendment (2014 Measures No. 3) Bill 2014: in Australia Special Conditions: [Letter to Treasury on Tax and Superannuation Laws Amendment in Australia Special Conditions.](#)
- Submission to Treasury on the draft Charities Bill 2013 and Explanatory Material (3 May 2013): [Charities Bill 2013.pdf](#)
- Submission to Senate Standing Committee on the Australian Charities and Not-for-profit Commission and Special Conditions for Tax Concessions Bills (30 August 2012): [ACNC and Special Conditions for Tax Concessions Bills.pdf](#)
- Submission to Treasury on the restating and standardising the special conditions for tax concession entities (including the 'in Australia' conditions (May 2012): [Restating the 'In Australia' requirements.pdf](#)
- Submission to Treasury on the 'Charitable Fundraising Regulation Reform Discussion Paper' (5 April 2012): [Charitable Fundraising Regulation Reform Discussion Paper.pdf](#)
- Submission to Treasury on a statutory definition of charity (9 December 2011): [Definition of charity consultation.pdf](#)
- Submission to Treasury on the 'in Australia' Special Conditions for Tax Concession Entities (August 2011): ['In Australia' special conditions for tax concession entities.pdf](#)
- Submission to Treasury on better targeting of not-for-profit tax concessions (July 2011): [Submission to Treasury consultation paper - better targeting of not-for-profit tax concessions.pdf](#)
- Submission to Treasury on scoping study for a national not-for-profit regulator (February 2011): [Treasury Consultation Paper - a 'one stop shop' opportunity for better not-for-profit regulation.pdf](#)